IN THE

Supreme Court of the United States

October Term 1969

No. [redacted]

WALTER SHER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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To:

THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUDGE OF THE SUPREME COURT OF THE UNITED STATES

The petitioner, Walter Sher, prays that a writ of certiorari shall issue to review a judgment of the New York State Court of Appeals entered on April 17, 1969.

Opinions Below

The majority and dissenting opinions of the Court are officially reported, 24 N.Y.2d 454, and may also be found in Vol. 702 at page 454 of the Advance Sheets Official Edition, Law Reports and Session Laws.

For the convenience of the Court, we shall reproduce both opinions as Exhibit A in the Appendix hereto.

Jurisdiction

The jurisdiction of this Court is apparently sought pursuant to 28 U.S.C., § 1257, subd. 3, it being argued that petitioner's Fourteenth Amendment right to a fair trial was denied him because of an anonymous telephone call made to certain members of the jury during the course of the trial urging them to convict.

Questions Presented

If we read the petition correctly, the gravamen of the claim is the petitioner was deprived of his Sixth and Fourteenth Amendment rights to an impartial jury and the right to be confronted by the witnesses against him, and to be afforded a chance to cross-examine because six members of the jury received an anonymous telephone call, after the People rested, from an unidentified woman urging them to disregard the evidence and to convict.

The jurors were all interrogated by the trial judge in the presence of counsel for both parties and they each promised to disregard the call and dismiss it from their mind and deliberate on the proof alone.

Petitioner argues as a matter of law he was not tried by a fair and impartial jury or confronted by a witness who contributed to his conviction and, finally, that he was denied the right to cross-examine.

Petitioner also contends that if certiorari should be granted on the foregoing basis, that he will also question the voluntariness of the confession because of a delay in the arraignment, plus the failure to advise the petitioner of his right to an attorney and, lastly, that it was improper not to instruct the jury specifically to consider petitioner's mental condition at the moment of his confession.

Constitutional Provisions Involved

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

The Evidence

The first prosecution witness, Christian Siegmann (64 *et seq.*), is a surveyor who prepared a diagram of Hansen's Jewelry Store which is People's Exhibit "2" in evidence.

Edward C. Hansen (82 *et seq.*), the brother of the deceased, testified on April 5, 1962, at approximately 4:55 P.M., he was in the rear of the store with Robert C. Reynolds (133 *et seq.*) and Eugene Formas (167 *et seq.*) while his brother, the deceased Donald, was in the front of the store. According to the witness, the defendants, Carbonaro and Sher, entered both with a gun in their hand.

Edward Hansen recognized appellant, Sher, because he had been in the premises the day before and made a deposit on a charm. The brothers Hansen, both unarmed, jumped Carbonaro and Sher, as a result of which Sher shot Donald Hansen to death and the witness was twice shot by Carbonaro, once in the left arm and once on the left side of his abdomen.

In the course of the struggle, Carbonaro lost his jacket which ultimately led to the arrest of Carbonaro by reason of a label in the coat.

Dr. Vincent Mastrota and Dr. Arnold Trattler (122 *et seq.* and 126 *et seq.*) treated the Hansen brothers at the North Shore Hospital.

Lillian Dunn (132) was sworn and then withdrawn.

Robert C. Reynolds (133 *et seq.*) was a jewelry messenger employed by the Hansens for about 5 years. Reynolds was in the jewelry store at the time of the holdup. He identified Sher.

Dr. Leslie Lukash (162 *et seq.*) is the Chief Medical Examiner for the County of Nassau. He testified to the results of an autopsy on the deceased, and he gave it as

his opinion that the death was caused by a massive hemorrhage and a perforation of the intestines from the penetrating bullet.

Eugene Formas (167 *et seq.*) was the sales manager of Hansen Jewelry Store, also present at the time of the stickup. Mr. Formas identified Sher.

Nancy Cappio (193 *et seq.*) testified she was on the sidewalk in front of the jewelry store and she saw two men enter the shop and heard the cries for help, and then observed two men running from the store. She identified one of the two as Carbonaro.

Dr. John D. Mountain (200 *et seq.*) treated Eugene Formas for a bullet wound of the left leg which Formas received during the shooting.

Roy Winnick (206 *et seq.*) was sitting in a car in front of the robbery scene and he saw the two robbers exit from the scene and leave in a Mercury automobile. Winnick identified one of the two as Dominic Carbonaro. He did not identify Sher.

Gary Winnick, a brother of Roy (224 *et seq.*), was also in the automobile. He identified Sher as one of the two men who came running from the store to make off in the Mercury.

Marc Berger (231 *et seq.*) was riding his bicycle in the vicinity of the holdup and he identified Carbonaro running from the scene.

William T. Moores (254 *et seq.*) drove a taxi in Port Washington. According to Mr. Moores, he picked Sher and Carbonaro up at the railroad station in Port Washington and drove them to the Long Island Expressway where he dropped them off at a Gulf service station.

The next witness, Patrolman Edmond Swiecki (259 *et seq.*) of the Port Washington Police Force found the get-

away car at about 2 P.M. on April 6, 1962, parked near the theatre on Main Street.

Detective George Maher picked up the getaway car and drove it to the Highway Patrol Bureau.

Patrolman Joseph Madsen, Jr. (266 *et seq.*) moved the Mercury car from the Highway Patrol Bureau to headquarters.

The next witness, Detective James Haynes of the Identification Bureau of the Nassau County Police Department, took the photographs of the murder scene on the day of the killing and also fingerprinted appellant on April 7, 1962.

Sergeant William Golden (281 *et seq.*) removed the steering wheel from the Mercury car and developed a latent palm impression on the steering wheel.

Lieutenant Harry G. Kaplun (285 *et seq.*) is the Commanding Officer of the Identification Bureau and the fingerprint expert of the Nassau County Police Department. The Lieutenant testified the palm print found on the steering wheel of the Mercury car was that of the appellant, Sher.

Detective John Skuzenski testified to the discovery of a loaded revolver at the scene as well as a suit coat and brown suitcase, plus a black attache case which contained four pairs of handcuffs, adhesive tape, a handkerchief, a pillowcase and gloves. A handcuff key which fitted the handcuffs was found in the Mercury automobile by Detective Michael Goosk (359 *et seq.*). A similar handcuff key was found in the parking area in front of the jewelry shop by Detective Daniel J. Cavanaugh (362 *et seq.*).

Deputy Inspector Glen Carpenter (364 *et seq.*) of the Technical Research Bureau was in charge of the Firearms Identification Division. The Inspector testified to the dis-

covery of two bullets found at the murder scene and the fact that they had been fired by the .22 caliber revolver found at the scene.

The next witness, Robert Brown (395 *et seq.*) was in the car with the Winnick brothers when the holdup men ran out but he could not describe either of the two that he saw. He did express the opinion that they left the scene in a 1953 or 1954 Mercury.

Detective Matthew Brennan of the Homicide Squad (399 *et seq.*) testified to the arrest of Sher early the morning of April 7, 1962, at 54 West 71st Street together with Carbonaro. Detective Brennan also testified to Sher's handwritten confession.

On the issue of voluntariness, counsel for appellant demanded a voir dire and Detective Matthew Brennan (399 *et seq.*) was the first witness summoned. Detective Brennan testified Sher was arrested at about 5:45 in New York and he arrived with Sher at the Sixth Precinct in Roslyn at about 7:25 A.M. A series of lineups were held commencing at 7:45 as a result of which Sher was identified as was Carbonaro, whereupon the questioning of Sher commenced at about 12:15 P.M. and was completed by 3:30 P.M. Following the interview, the written statement was prepared and typed and signed, which job was completed by 5:45 P.M.

The next witness was Detective Edwin Neumann (427), whose testimony corroborates generally that of Detective Brennan regarding the arrest and transportation of Sher to Roslyn, as well as the lineups and identification of both defendants by various witnesses.

The final witness (457) called on the issue of voluntariness was the Commanding Officer of the Homicide Squad, Captain Charles Spahr, whose testimony is corroborative of those officers who preceded him.

The next witness, Detective Eugene Russell (502) of the Safe, Loft and Truck Squad of the New York City Police Department, testified that on April 3, 1962, which would be two days before the homicide, he observed Sher and Frank Risotti in a Mercury car with New Jersey plates, and he attempted to trail them because he was suspicious of Frank Risotti. Detective Russell then knew Risotti but he did not know the identity of Sher.

The next witness, Detective Robert A. Hawd (506 *et seq.*) was with Russell on April 3rd tailing Risotti. Like his companion, Detective Hawd identified Sher as the operator of the Mercury, identified in People's Exhibit "7" as the getaway car in the robbery and homicide.

Next to the stand was a County Court Reporter, Michael Wowk (508 *et seq.*) who testified to Sher's question and answer statement as procured by Assistant District Attorney William Cahn.

The last witness was a Ruth Gordon (532 *et seq.*), a resident of 137 Hillside Avenue, Newark, New Jersey. The New Jersey plate on the holdup car checked out to a James Duffy of 137 Hillside Avenue, Newark, New Jersey. Mrs. Gordon had resided for 11 years with her family at the 137 Hillside Avenue, Newark, New Jersey address, and there was no tenant or occupant during the 11 year period by the name of James Duffy.

The Defense

The first defense witness was Robert E. Peck (561 *et seq.*), a psychiatrist on the staff of Meadowbrook Hospital. Dr. Peck testified he examined Sher on April 25, 1962, pursuant to court Order to determine Sher's fitness to stand trial. Dr. Peck concluded that Sher was suffering from a schizophrenic reaction, paranoid type, acute and severe.

It was Dr. Peck's opinion that Sher was incapable of standing trial and he returned the prisoner to the Nassau County Jail with the suggestion that Sher be transferred to Matteawan. Sher, however, upon his return to the County Jail refused to eat so he was returned to Meadowbrook Hospital and was examined by a Dr. Goldstein on May 4, 1962, who agreed with Dr. Peck's original diagnosis.

Sher was then returned to the County Jail where he still would not eat so he was re-admitted to Meadowbrook Hospital on May 15, 1962, where he was re-examined by Dr. Goldstein who again concluded that Sher had a schizophrenic reaction, paranoid type, chronic and severe.

Significantly, Dr. Peck expressed no opinion regarding Sher's sanity at the time the homicide occurred (611).

The second defense witness, Moe Sher (586 *et seq.*), was the father of the defendant. He gave no material testimony.

The third defense witness was Dr. Majid Mogtader, a psychiatrist at Pilgrim State. In Dr. Mogtader's opinion, as a result of a court ordered examination conducted by him on May 25, 1962, Sher was psychotic, schizophrenic, the paranoid type. Significantly, this defense expert gave no opinion regarding Sher's state of mind at the time the crime took place (677).

As a result of the report of Dr. Mogtader and that of Dr. Peck and following a hearing, Judge Kelly of the County Court, found as a fact that Sher was incapable of standing trial and ordered his transfer to the Matteawan State Hospital at Beacon, New York.

The fourth defense witness, Maryann Cotton (716 *et seq.*) was the Court Clerk of the Arraignment Part of the District Court, summoned apparently to establish when the Arraignment Part of the District Court is open for business. As the trial judge instructed the jury that, as a matter of law, there was an unreasonable delay in the arraignment, the testimony is of no consequence.

Following the trial and conviction of Carbonaro, Sher was returned to Nassau County to stand trial where on October 11, 1963 and October 15, 1963, he was examined by Dr. J. Martin Semer (802 *et seq.*) and Dr. Lawrence Sutton (914 *et seq.*) to determine his sanity on April 5, 1962, when he shot and killed Donald Hansen. Dr. Semer concluded that Sher was indeed suffering from schizophrenia, paranoid type, chronic and severe, and in his opinion, Sher did not know the nature and quality of his act when the deceased was grappling with Sher for Sher's gun.

The final defense witness, Dr. Lawrence Sutton (914 *et seq.*) examined Sher on two different occasions, first, on September 7, 1962, when he was appointed by the Court to determine if Sher was capable of standing trial. Dr. Sutton reported Sher was suffering from schizophrenia, paranoid type, and could not intelligently confer with counsel to prepare his defense.

Dr. Sutton also examined Sher on October 12, 1963, and with Dr. Semer on October 15, 1963, and in Dr. Sutton's opinion, Sher had been suffering from this mental disease since he was 15 or 16 years of age.

Curiously, Dr. Sutton conceded that Sher definitely knew the nature and quality of his act during the planning period for the robbery, during the arrival at the scene with Carbonaro and he certainly knew they were armed with a gun, and had a bag and a pillowcase and handcuffs, and he knew the nature and quality of his acts when he went into the store, and he knew the nature and quality of his acts when he shot and killed the deceased when he dropped the gun to the floor and picked it up, and he also knew that the gun could kill and society considered it wrong but in Dr. Sutton's opinion, Sher's capacity to know the nature and quality of his acts fled from his mind at the very moment that the deceased grappled in defense of his life with Sher, and Sher was out of his mind the second that he squeezed

the trigger to kill the deceased. Finally, Sher's mind returned when he let go of the trigger and he knew what he was doing when he fled from the scene.

Rebuttal

The People's first witness in rebuttal was Mrs. Dorothy Berry (1009, *et seq.*), a registered nurse employed at Meadowbrook Hospital where she was the evening nurse in charge of the observation ward in the prison section. According to Mrs. Berry, on the evening of June 15, 1962, at 6 o'clock, she was on her way to the jail section with medication when a Sheriff's officer outside Ward "O" asked her to stand by while he went to the bathroom. Sher was in Ward "O" and the entranceway to the jail ward was entered through a solid panel door that was partly open. According to Mrs. Berry, she saw and heard Sher talking to another inmate and boasting that although he was then being sent back to jail, he had the Judge and District Attorney involved in a big fight. The Judge wanted to send him to a hospital whereas the District Attorney wanted to put him to trial.

Sher also boasted that when he got back to the jail, he would go on another hunger strike, filching bits of food from others and the stupid Doctor and the jail would send him back to the hospital again.

She also testified and this is undisputed that she then and there made a notation in the Meadowbrook Hospital records relative to this conversation.

The next prosecution witness was Dr. Erniani D'Angelo (1026), retained by the District Attorney to examine Sher. The examination took place on May 23, 1962, at the hospital ward at Meadowbrook and Dr. D'Angelo's initial opinion was Sher suffered from schizophrenia, paranoid type, which after further consideration was changed.

Dr. D'Angelo concluded finally that Sher was malingering and faking his insanity and that Sher definitely knew the nature and quality of his acts and that they were wrong.

The next prosecution witness was the Superintendent at Matteawan, Dr. William C. Johnston (1182, *et seq.*), who testified that he examined Sher with a Dr. Lanzkron, also of the Matteawan staff, on July 12, 1963, at which time Sher confessed to him that he had, indeed, been faking his mental symptoms for more than a year, and he had never heard voices, and really didn't believe he was being poisoned by anyone.

Dr. Johnston also testified that Sher confessed to him that he knew he wasn't arrested for anything but the shooting of the deceased in connection with a robbery of a jewelry store. The defense psychiatrists apparently were fooled by such silly things as Sher telling them that he didn't remember being in the military service, and he believed he was in the Raymond Street Jail, all of which he lied about.

The Doctor concluded his testimony by saying that Sher told him he was anxious to return and to stand trial. In Dr. Johnston's opinion, Sher was a malingerer and faker although when examined initially at the hospital, the issue was unresolved. The initial diagnosis was schizophrenia but on May 3, 1963, it was changed to a simple psychosis with a psychopathic personality.

Dr. Johnston wound up his testimony expressing the opinion that Sher had deliberately and consciously planned to mislead the psychiatrists and that he never was psychotic at any time.

The final witness was Detective James Haynes of the Identification Bureau of the Nassau County Police Department who gave no material testimony.

The Writ Should Be Disallowed

There are no compelling reasons for granting the writ because the New York State Court of Appeals did not decide a federal constitutional question heretofore undetermined by this Court. Moreover, the Court of Appeals has not decided this case in a way probably not in accordance with any prior controlling decision of this Court.

In all likelihood, the key issue elevated by the petition has to do with the anonymous telephone call made to six members of the jury during the action.

At the trial, it came to the attention of the Judge that an unidentified female had telephoned a number of jurors urging each to convict. Judge Lynde, with the District Attorney and counsel for the defendant present, examined each of the jurors with the following results:

Gordon Kinsey (538 *et seq.*):

Kinsey testified that he received the anonymous telephone call about 9 o'clock at night and "they started to mention Walter Sher, and to charge him guilty, disregard the defendant's attorney. So I just hung up."

Mr. Kinsey assured the Judge that he could put it completely out of his mind and forget the call and render a verdict on the available evidence. Kinsey assured Judge Lynde that he hung up as soon as he realized what the call was all about.

Edward Yasko (540 *et seq.*):

Yasko testified to the call as follows:

> "Well, word for word I don't remember what she said, I was a little upset when she called. Something to the effect that she was a fellow resident of Nassau County and I was on a jury and I should urge my fellow jurors to vote for the electric chair. And at this point something about the testimony for insanity, that I should disregard all testimony

regarding this, and she ended by saying that this is just a friendly call, and I don't recall if I hung up first or she hung up first."

Yasko assured Judge Lynde that he was "absolutely" certain that he could put the call out of his mind as if it never occurred and render a verdict on the evidence alone.

Ernest Smoker (542 *et seq.*):

Of the call, Smoker testified as follows:

> "Well, I was discussing something with my brother-in-law at the time, and my wife answered the phone, and I noticed that she became annoyed. It seems that this woman asked for me but would not give her name. My wife gave me the phone and I took the call, the person asked me my name, I gave my name, and then they started to talk about civic-minded justice, and then for some reason I had a premonition that I shouldn't get this call. I gave the call back to my wife, I said 'Hang this call up'. And before she hung it up she listened again and she heard the last part, that this is a friendly call, please tell your fellow jurors."

Smoker assured Judge Lynde that he could put the call out of his mind and render a verdict on the evidence alone.

Joseph Rollo (543 *et seq.*):

Rollo did not receive a call from the stranger although as a result of what happened, and the action of the Judge, he realized that some jurors received an anonymous call "that something was mentioned that he was a vicious killer, or something like that, and that's about all."

Rollo reassured Judge Lynde that he would put the whole business of the anonymous telephone calls made to other members of the jury out of his mind and reach a verdict on the evidence alone.

Charles Guest (545 *et seq.*):

Guest received a call and he described what happened as follows:

> "I answered the phone and said hello. She said 'Mr. Guest?' I said, 'Yes.' She said something to the effect that the defendant must be found guilty. And then I realized, this struck me funny for the moment, I realized what it was and I hung up. I didn't say anything to her except 'Yes,' my name was Guest."

Guest like all the other members of the jury polled by the Judge reassured him that he would not be influenced by what happened and would not draw any inference from it. Guest promised Judge Lynde that he would wipe it out of his mind. "I have already done that. I have more or less forgotten about the whole thing."

William Frye (546 *et seq.*):

Mr. Frye received a call about which he testified as follows:

> "Well, I was in the bathroom. My wife took the call, it was a woman's voice, she insisted on speaking to Mr. Frye. The wife asked to give her name. She refused to give her name. She said it is an important matter and Mr. Frye will understand if you will bring him to the phone. And when she refused to give her name, upon my wife's insistence, my wife terminated the call by hanging up."

According to Frye, he never actually spoke to the caller on the telephone. Like all the others, however, he realized what it was all about when he reported for work the following morning. The witness reassured Judge Lynde that he could put the call completely out of his mind as if it never occurred, and would draw no inference from anything that was said or what had happened.

William Nachbar (548 *et seq.*):

Nachbar testified that he received the following information from the caller:

> "She told me that the defendant was a vicious killer with a past record and that he should be sent to the chair. She also said that the other man in the crime had been sentenced to death. She spoke in low, husky, vindictive voice, I would say, and I tried to interrupt her on three or four occasions but she carried on as though she hadn't heard me at all. It sounded to me as if she were reading."

Regarding his feelings, Nachbar testified thusly (549):

> "If I may say so, Judge, this incident has done only one thing to me: It has strengthened my resolve to be completely impartial and to be governed by the evidence alone. There was no evidence given me at all yesterday, nothing whatsoever that could be called evidence. It was just somebody's urging to do a certain thing."

Robert Kirschenheiter (550 *et seq.*):

Kirschenheiter did not get a telephone call about the trial. The witness was out of the house and when he returned at about 9:30, his wife told him that one of his fellow jurors, Edward Yasko, called while he was out and he returned the call as they used to drive to the trial in a car pool, and it was from Yasko that he got the tip that someone was telephoning. Kirschenheiter repeated that Yasko told him that the stranger "requested him to take no heed of what the defense might be, and that he should try to urge his fellow jurors to vote for the electric chair."

Kirschenheiter assured Judge Lynde that he would put the happening completely out of his mind as though it never occurred, and render a verdict on the evidence alone.

James Krut (552 *et seq.*):

No call was made to or received by Krut and he assured the Judge that he had already put out of his mind what

happened to the other jurors the night before, and that he would reach a verdict on the evidence alone.

Charles Shaw (553 *et seq.*):

Charles Shaw did not receive a call either. Shaw reassured the Judge that he would deliberate on the evidence alone and dismiss the call completely from his mind.

George Lee (554 *et seq.*):

Lee did not receive a telephone call although like all the others, when he came to Court this morning, he realized what had happened to some members of the jury. He gathered that the caller had informed the individual jurors that "this man was a vicious killer. In general, I think that would sum it up. I didn't hear the full context of it, but that they were going to plead insanity and it should be ignored. Other than that, that's about all I can recall."

The witness reassured Judge Lynde that he could "positively erase it from my mind."

Floyd Giambalvo (555 *et seq.*):

Mr. Giambalvo was not called on the phone although he, too, learned what happened when he arrived at Court. His testimony is as follows:

> "Well, from what I understand he said to disregard any defense testimony as far as insanity and to go for the works, go for the whole deal on this."

Giambalvo reassured the Judge, as did all the others, that they could put the episode completely out of their mind and deliberate on the evidence alone.

Robert McDougald (556 *et seq.*):

McDougald did not receive a call but he understood that those who did were advised "to vote for the death penalty."

Mr. McDougald reassured the Judge that he would not let it influence him at all and would not draw any inferences from any of the conversation or what had happened.

Gerard Cattone (558):

Mr. Cattone did not receive any call although he, too, learned what had happened upon coming to Court this morning. It was his understanding "that a woman called and she stated that it was a friendly call, and something to the effect that he should be guilty of that particular crime."

Cattone reassured Judge Lynde that he "definitely, definitely" could put the incident out of his mind, disregard it and not consider it in any way when he deliberated on the appellant's fate.

Thomas Seaman (559 *et seq.*):

Seaman was the last juror interviewed. He did not recall a call although, like the others, he learned of the episode when he arrived at Court for the continuance of the trial. He does not know what transpired except that some woman called and tried to talk to some members of the jury about the case. Seaman reassured Judge Lynde that he would put the incident completely out of his mind and deliberate on the evidence alone.

The Judge also questioned all of the jurors except Nachbar and Kinsey regarding any conversation they might have had with other members of the jury with regard to the contents of the telephone call received by anyone of them. Kinsey did not figure in the verdict because he was taken ill on October 30, 1963, and the case was adjourned until the following day, October 31, 1963, at which time Kinsey was excused with the consent of the District Attorney and defense counsel because of his high blood pressure. An alternate was selected by lot and this turned out to be the first alternate, Robert McDougald.

Yasko spoke to no one but Kirschenheiter who he drove to court with (541); Smoker didn't discuss it with any other juror (543); Rollo knows nothing about the content of the call other than appellant was referred to as "a vicious killer" (544); Guest didn't discuss the content of the call with any other member of the jury (546); Frye knew nothing about the subject matter of the call other than that he heard a fellow juror report to Shannon, the Clerk, that appellant was a "vicious killer" (547); Kirschenheiter talked to no one but Yasko (551); Krut knew only that the caller recommended that they bring in a verdict of guilty or something to that effect and disregard what the psychiatrists say (552); Shaw believed the caller referred to the appellant as a vicious killer or something like that and tried to influence the jurors along that line (554); Lee believed the caller urged the jury to disregard the defense of insanity (555); Giambalvo believed the caller urged the jury to disregard insanity (556); McDougald believed the anonymous caller urged them to vote for the death penalty (557); Cattone believed the caller urged the jury to convict (558); Seaman didn't know the content of the calls (559).

With the single exception of Nachbar, the remarks of the caller were not substantially different from those the jurors may have read in the press or heard at the trial. They boiled down to four comments:

1. Vicious killer.

   This comment would not be prejudicial if read by a prospective juror in the newspaper or made by the District Attorney in summation. It was a legitimate inference for anyone to draw from the facts.

2. Disregard the psychiatrists.

   This was exactly what the District Attorney urged the jury to do in summation, and he had every legal right to make the comment.

3. Forget the defense of insanity.

It would be impossible to try this case as a prosecutor without urging the jury to disregard the defense of insanity. Such a comment read by a prospective juror prior to trial in the newspaper would not in and of itself be ground for challenge.

4. Bring in guilty verdict.

The conclusion of every good summation reminds the jury of their duty and recommends that their decision or verdict should be guilty.

If any of these comments were read pre-trial, they would not disable a prospective juror from serving where he reassured the Judge that (Sec. 376(2) Code Crim. Proc.):

> "The previous expression or formation of an opinion or impression in reference to the guilt or innocence of the defendant, or a present opinion or impression in reference thereto, is not a sufficient ground of challenge for actual bias, to any person otherwise legally qualified, if he declares on oath, that he believes that such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence, and the court is satisfied, that he does not entertain such a present opinion or impression as would influence his verdict."

It is undisputed that each juror was questioned thoroughly by Judge Lynde in the presence of the District Attorney and counsel for the defendant and each juror assured the trial judge that they would not be influenced by the call but would confine themselves exclusively to the trial evidence.

Clearly, the trial judge did not, as a matter of fact, or law, abuse his discretion when he decided to continue these jurors in their capacity as the finders of the fact (*People* v. *La Marca* [1965], 4 N.Y. 2d 925 [Weinberger baby kidnapping case]).

Regarding Nachbar, there was possibly one and maybe two prejudicial things spoken about:

> 1. Carbonaro was convicted [not prejudicial]. (*United States* v. *Feldman* [2d Cir. 1962], 299 F.2d 914, cert. den. 370 U.S. 910.
>
> 2. Sher had a record [*prejudicial*] (*United States* v. *Marshall*, 360 U.S. 310).

Following the questioning of the jurors by Judge Lynde, the District Attorney, Harold Spitzer, made the following recommendation (560):

> "Mr. Spitzer: The only thing I can say is that all the jurors seem to have received about the same message, except that one juror, I think it is Mr. Nachbar, who apparently received the further message to the effect that Carbonaro was sentenced to the electric chair.
>
> Of course, that presently a slightly different question than the conversation with the other jurors, and if counsel for the defendant wished to specifically challenge this juror, I would not interpose any objection as to that particular juror. As to all the others, they in the first place have heard something that I am sure they will disregard, as they have said they will. But in any event, it is something that they would probably hear as jurors in the trial in any event, psychiatric testimony, and comments on psychiatric testimony. But that is the only thing I have to say."

The District Attorney obviously had in mind replacing Nachbar with an alternate but counsel for defendant would have none of it. The defense insisted there must be a mistrial as there was no authority to excuse Nachbar and replace him with the spare. The motion for a mistrial was denied (562) and the claim is appellant from that time forward was not tried by a fair and impartial jury, as guaranteed him by the Fifth and Sixth Amendments, as well as Article 1, § 2 of the New York State Constitution.

Section 358(a) provides for the selection of alternate jurors "whenever, in the opinion of a Judge of a court of criminal jurisdiction about to try with a jury a defendant against whom has been filed any indictment * * * for a felony * * * that it is advisable to do so * * *."

After detailing the manner and means of selection and the duty of the alternates, § 358(a) provides:

> "If, before the final submission of the case, a juror die, or become ill, or for any other reason he be unable to perform his duty, the Court may order him to be discharged and draw the name of an alternate who shall then take the seat of the discharged juror in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors."

It is immediately apparent that the section was enacted to deal with not only the physical incapacity of a juror but *any* disability which might arise which would make him "unable to perform his duty."

The Court has said (*People* v. *Ryan*, 19 N.Y. 2d 100, pp. 102-103):

> "The provisions of § 358(a) are included as part of the procedure in many of the states * * * [and] are not only convenient but just both to the public and the defendant and in no way conflict with our constitutional prohibition against the violation of substantial right of trial by jury as it was used prior to the adoption of the Constitution."

It is beyond question that evidence of defendant's bad character (*Parker* v. *Gladden* [1966], 385 U.S. 363) or prior criminal record (*People* v. *Cocco* [1953], 305 N.Y. 282) have no place before the jury. Today, it is settled a juror is subject to challenge before or after he is sworn who comes by such evidence surreptitiously or innocently (*supra*).

It is without question that every defendant is entitled constitutionally to a fair and impartial jury but *it is equally well established that no defendant has a constitutional right to a mistrial.* Where evidence possibly prejudicial to the accused has come to the attention of a juror after he is sworn, an inquiry must be conducted with counsel for the defendant being given an opportunity to be heard (*People* v. *Colascione* [1968], 22 N.Y. 2d 65, p. 69) at which time the burden is on the accused to object and challenge for cause.

Where there are no alternate jurors, a mistrial may be inevitable (*People* v. *Cocco* [1953], 305 N.Y. 282) but where an alternate is available, as here, no such drastic remedy is necessary to insure an impartial jury (§ 358-a Code Crim. Pro.; *cf. People* v. *Ryan* [1966], 19 N.Y. 2d 100; *People* v. *Mitchell* [1934], 266 N.Y. 15).

Counsel for the defendant, for reasons of his own choosing, refused to challenge Nachbar or consent to a substitution. It is too late to be heard at this time (*People* v. *O'Keefe* [3d Dept. 1953], 281 App. Div. 409, aff'd 306 N.Y. 619; *State* v. *Lilja* [1923], 155 Minn. 251, 193 N.W. 178).

In the *O'Keefe* case, the corrected record on appeal reveals that after four jurors had been accepted and sworn, the Judge summoned in #4 juror to his chambers to determine if she was disqualified to act as a juror. The Judge advised both parties of what he discovered and recommended that they consent that the juror be excused. Counsel for O'Keefe refused to consent so the jury selection continued and O'Keefe was tried and convicted.

The primary issue in the case on appeal had to do with the fairness of the jury as finally constituted.

The trouble with the juror in the *O'Keefe* case is that she knew a tenant in a building owned by one of the defendants and that tenant had introduced her to the wife of one of the defendants, and that she herself had once lived in that building.

Defendant contended in the Appellate Division that "as a result of the interview, the jurors was made to feel that she was under suspicion of being friendly to the defendants and that, therefore, she might lean over backwards and decide against them, in an effort to demonstrate that the suspicion was unfounded. This amounts to saying that the defendants believed that the juror would not be a fair juror and that she had been so affected by the episode that she could not 'try the issue impartially and without prejudice to the substantial rights' of the defendants" (*People* v. *O'Keefe*, 281 App. Div. 409, p. 414).

In upholding the judgment of conviction, both the Appellate Division and this Court concluded that O'Keefe's refusal to consent to the juror being excused by the Court was a knowing and intelligent waiver binding the accused.

There is every reason to believe that the decision by this defense counsel was made deliberately because during the selection of the jury, the District Attorney was questioning Arthur Shechner when it developed that the prospective juror had, indeed, read about the conviction of Carbonaro and the fact that he had received the death sentence. Nevertheless, Shechner reassured the Judge, the District Attorney and defense counsel that he would not in any way be influenced by the results of the other trial.

At first, the defense lawyer challenged the entire panel believing that Shechner had volunteered in the presence of other prospective jurors the content of the news story. When the record was reread, defense counsel was satisfied that no such comment had been made and he "withdrew the motion" (Supp. Rec. on App. 91).

Defense counsel also examined Shechner specifically with regard to the news item relative to Carbonaro and whether he could deliberate on the evidence alone. Shechner assured those at the trial that he would and could be fair. Shechner obviously convinced counsel for the defendant because there was *no* challenge for cause interposed by counsel for the defendant (114-120).

Undoubtedly, out of a sense of super-precaution, the District Attorney peremptorily challenged Shechner (Supp. Rec. on App. 120) as he had every right to do (§ 372, 373 Code Crim. Pro.). There is not the slightest doubt that a peremptory would have been used by the District Attorney on Nachbar if it was constitutionally permissible.

It is most respectfully submitted the information, with the single exception of Nachbar, was neither inflammatory nor prejudicial. Each juror promised to deliberate on the proof alone. They were by this Court's own standards "disinterested jurors whose judgments are based solely upon a consideration of competent proof received in open court". (*People* v. *Genovese* [1962], 10 N.Y. 2d 478).

The only evidence in this case sustains the charge that appellant was tried by a fair and impartial jury. He was convicted on the evidence alone and not the information telephoned to any of the jurors.

The duty of the trial judge today has grown increasingly difficult as well as uncertain because of the rapid movement today towards separate trials for cases involving multiple defendants (*Bruton* v. *United States* [1968], 391 U.S. 123; *People* v. *Owens* [1968], 22 N.Y. 2d 93; *People* v. *La Belle* [1966] 18 N.Y. 2d 405).

The danger that a prospective juror may have read about the case against the on-trial defendant is now compounded by the possibility that he might have read about an earlier trial and conviction and sentence of a co-defendant. This threat is both real and present. It is imperative in each instance for all those on the trial level to fully explore the impact of the news item to prove "the previous expression or formation of an opinion or impression in reference thereto, is not a sufficient ground of challenge for actual bias, to any person otherwise legally qualified, if he declare on oath, that he believes that such opinion or impression will not influence his verdict, and that he can

render an impartial verdict according to the evidence, and the court is satisfied, that he does not entertain such a present opinion or impression as would influence his verdict'' (§ 376, subd. 2, Code Crim. Pro.; *People* v. *Genovese* [1962] 10 N.Y. 2d 478).

Once counsel for the accused has been made aware of the full facts, the *burden* is on him to challenge for bias or waive.

Any other rule would lead to chaotic conditions on the trial level for it would confer upon a disloyal prosecutor, an unscrupulous police officer, or a contemptuous defense lawyer total control over every major criminal trial by conferring the complete authority on the participants to abort any criminal trial with an anonymous telephone call to a single member of the jury.

Petitioner relies principally upon *Parker* v. *Gladden,* (385 U.S. 363) which, as the court below commented, ''involved the vastly more serious situation of a court official, a bailiff, passing on the contaminated words * *. That is not to be compared with an anonymous or other irresponsible communication which a jury should easily understand is to be given no credence, if so advised and admonished'' (24 N.Y. 2d 454, p. 458).

CONCLUSION

The petition should be disallowed

Respectfully submitted,

WILLIAM CAHN
District Attorney, Nassau County
Attorney for Respondent

HENRY P. DEVINE
Assistant District Attorney
of Counsel

(APPENDIX)

Exhibit A

(Opinions of the New York State Court of Appeals)

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. WALTER SHER, Appellant.

Argued January 24, 1969; decided April 17, 1969.

Crimes—murder in first degree—anonymous communications by telephone with jurors following close of People's case and before submission of defense did not prejudice defendant—each of jurors related conversations and was questioned as to impartiality and replied that he would be impartial and confine verdict to record evidence.

Anonymous communications by telephone with several of the jurors following the close of the People's case and before the submission of the defense in a trial which resulted in defendant's conviction of murder in the first degree did not prejudice defendant. Each of the jurors during the trial related his own conversation with the anonymous caller and with his fellow jurors and was questioned as to whether he could sit impartially and confine his verdict to the record evidence, and each answered in the affirmative. Any possible harm was thus cured.

APPEAL from a judgment of the Supreme Court (EDWIN R. LYNDE, J.), rendered December 13, 1963, in Nassau County upon a verdict convicting defendant of murder in the first degree (see 15 N.Y. 2d 798).

POINTS OF COUNSEL

Mario Matthew Cuomo for appellant. I. The trial court erred in refusing to order a mistrial. (*People* v. *Sprague*, 217 N.Y. 373; *People* v. *Cocco*, 305 N.Y. 282; *People* v. *Durling*, 303 N.Y. 382; *Parker* v. *Gladden*, 385 U.S. 363; *People*

v. *LeLucia*, 20 N.Y. 2d 275; *Remmer* v. *United States*, 347 U.S. 227; *Bainton* v. *Board of Educ. of City of N. Y.*, 57 Misc 2d 140; *People* v. *Colascione*, 22 N Y 2d 65.) II. The trial court's charge on the question of insanity was prejudicially erroneous in two particulars. In any event, the jury's verdict on the issue was against the weight of the evidence. (*People* v. *Cooke*, 292 N.Y. 185; *People* v. *Sandgren*, 302 N. Y. 331; *People* v. *Egnor*, 175 N. Y. 419; *People* v. *Stern*, 201 App. Div. 687, 237 N. Y. 514; *People* v. *Tobin*, 176 N. Y. 278; *People* v. *Kelly*, 302 N.Y. 512; *People* v. *Downs*, 123 N. Y. 558; *People* v. *Lally*, 19 N Y. 2d 27; *Taylor* v. *United States*, 222 F. 2d 398.) III. Defendant was denied a fair hearing with respect to the admissibility and weight of the alleged confessions both at the trial and upon the *Huntley* hearing. (*People* v. *Carbonaro*, 21 N Y 2d 271; *Miranda* v. *Arizona*, 384 U.S. 436; *Johnson* v. *New Jersey*, 384 U. S. 719; *People* v. *Joyce*, 233 N. Y. 61; *People* v. *Schompert*, 19 N Y 2d 300; *Fikes* v. *Alabama*, 352 U. S. 191; *Blackburn* v. *Alabama*, 361 U. S. 199; *Spano* v. *New York*, 360 U. S. 315; *People* v. *Leyra*, 302 N. Y. 353; *People* v. *Vargas*, 7 N Y 2d 555; *People* v. *Wood*, 12 N Y 2d 69.) IV. The People did not establish defendant's guilt of premediated murder beyond a reasonable doubt. (*People* v. *Moran*, 249 N. Y. 179; *People* v. *Roper*, 259 N. Y. 170; *People* v. *Barberi*, 149 N. Y. 256; *People* v. *Colavecchio*, 11 A D 2d 161; *People* v. *Jackson*, 14 N Y 2d 5.) V. The death penalty statute under which defendant was convicted is void for unconstitutionality. (*United States* v. *Jackson*, 390 U. S. 570.)

William Cahn, District Attorney (*Henry P. De Vine of* counsel), for respondent. I. Guilt was established beyond a reasonable doubt. (*People* v. *Harris*, 209 N. Y. 70; *People* v. *Ferraro*, 161 N. Y. 365; *People* v. *Hawkins*, 109 N. Y. 408; *People* v. *Majone*, 91 N. Y. 211; *People* v. *Carbonaro*, 21 N Y 2d 271.) II. The trial was fair. (*People* v. *Gunner*, 15 N Y 2d 226; *People* v. *McQueen*, 18 N Y 2d 337; *People* v. *Horton*, 18 N Y 2d 355.) III. The *Huntley*

hearing was fair. IV. The charge was not prejudicial. (*People* v. *McQueen*, 18 N Y 2d 337; *People* v. *DeRenzzio*, 19 N Y 2d 45; *People* v. *Arthur*, 22 N Y 2d 325; *People* v. *Newman*, 1 N Y 2d 875.) V. Section 1045 (subd. 2) does not violate the Sixth Amendment. (*United States* v. *Jackson*, 390 U. S. 570; *Pope* v. *United States*, 392 U. S. 651; *Witherspoon* v. *Illinois*, 391 U. S. 510; *People* v. *Fernandez*, 301 N. Y. 302, 340 U. S. 914). VI. The jury was fair. (*People* v. *La Marca*, 4 N Y 2d 925; *United States* v. *Feldman*, 299 F. 2d 914, 370 U. S. 910; *Marshall* v. *United States*, 360 U. S. 310; *People* v. *Ryan*, 19 N Y 2d 100; *Parker* v. *Gladden*, 385 U. S. 363; *People* v. *Cocco*, 305 N. Y. 282; *People* v. *Mitchell*, 266 N. Y. 15; *People* v. *O'Keefe*, 281 App. Div. 409, 306 N. Y. 619; *People* v. *Genovese*, 10 N Y 2d 478; *Bruton* v. *United States*, 391 U. S. 123.)

Opinion Per Curiam

Per Curiam. Walter Sher appeals from a judgment of conviction of two counts of murder in the first degree arising out of a jewelry store holdup on April 5, 1962. Sher was indicted along with co-felon Dominic Carbonaro on April 13, 1962. Both men pled not guilty. The District Attorney contemplated bringing both Sher and Carbonaro to trial together. Before trial, however, Sher was committed to Matteawan State Hospital. A hearing was held before the County Court, Nassau County, which found that Sher was not sufficiently capable of understanding the charges pending against him to make a defense and confer intelligently with counsel. Carbonaro, therefore, stood trial alone. He was convicted of felony murder on October 4, 1963 and sentenced to death.

Sher was returned from Matteawan on July 23, 1963 to stand trial. His trial commenced on October 8, 1963, four days after Carbonaro had been found guilty. The jury returned a verdict of guilty on November 21, 1963.

A separate sentencing hearing was held before the same jury and a sentence of death was imposed.*

Both Sher and Carbonaro appealed their convictions directly to the court. After the appeals were first docketed, a stipulation was entered into by counsel for both defendants and the District Attorney to remand the cases for confession hearings pursuant to *People* v. *Huntley* (15 N Y 2d 72) . (See *People* v. *Sher* and *Carbonaro*, 15 N Y 2d 798.) Both Sher's and Carbonaro's confessions were found to be voluntary. Before Sher's appeal was again on the calendar for argument, the court affirmed the judgment of conviction of Dominic Carbonaro (*People* v. *Carbonaro*, 21 N Y 2d 271). The present appeal is before the court pursuant to the original notice of appeal and the stipulation.

The proof of the substantive crime and the identity evidence in this appeal are substantially the same as that reviewed and affirmed in the separate appeal of Carbonaro. In the *Carbonaro* case the court found that "The evidence establishing defendant's guilt was overwhelming" (*People* v. *Carbonaro, supra,* p. 275). That is the case again. Sher does not claim that the evidence of his guilt is insufficient. Counsel in his brief candidly concludes that: "There is no question but that Walter Sher and Dominic Carbonaro were both involved in the perpetration of acts which, assuming a proper and fair trial and a finding of sanity, would justify a conviction."

The only incident during trial on which there is disagreement in the court as to whether its occurrence requires a new trial is the anonymous communications by telephone with several of the jurors following the close of the People's case and before submission of the defense. The incident resulted in no palpable prejudice to defendant

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* As to death sentences in pending cases, see press release of June 1, 1965 by Governor Rockefeller at the time of approval of L. 1965, ch. 1030, § 125.30 (repealed by L. 1967, ch. 791, §10, enacting a new Penal Law, § 125.30).

since each of the jurors during the trial was questioned whether he could sit impartially and confine his verdict to the record evidence, and each answered in the affirmative, despite the telephone calls to Nachbar and others of the jury. This was after each related his own telephone conversations with the annonymous caller and with his fellow jurors. This cures the possible harm under the accepted precedents because the questioning of the jurors and admonition to them serve a real purpose in drawing their attention to the unfairness of their considering anything but the record evidence (e.g., *People* v. *Levy,* 15 N Y 2d 159, 166-167; *People* v. *Broady,* 5 N Y 2d 500, 514-516; *People* v. *Sorrentini,* 26 A D 2d 827; *People* v. *Jackson,* 20 A D 2d 918; cf. *People* v. *Hulett,* 22 N Y 2d 696, affg. 28 A D 2d 624; *People* v. *Lubin,* 190 App. Div. 339, affd. 229 N. Y. 601; see, generally, 66 C. J. S., New Trial, § 51).

Significantly, the juror Nachbar, to whom the only really seriously unfavorable communications were made, stated: "A. If I may say so, Judge, this incident has done only one thing to me: It has strengthened my resolve to be completely impartial and to be governed by the evidence alone. There was no evidence given me at all yesterday, nothing whatsoever that could be called evidence. It was just somebody's urging to do a certain thing."

People v. *Cocco* (305 N.Y. 282) involved an entirely different situation. There the improper communication came to defendant's attention after the verdict and there was never an opportunity to "sterilize" the jury by appropriate examination and admonition. *Parker* v. *Gladden* (385 U.S. 363) involved the vastly more serious situation of a court official, a bailiff, passing on the contamination words (see, generally, Ann., Prejudicial effect, in criminal case, of communication between court officials or attendants and jurors, 41 ALR 2d 227). That is not to be compared with an anonymous or other irresponsible communication which a juror should easily understand is to be given no credence, if so advised and admonished.

Accordingly, the judgment of conviction should be affirmed.

DISSENTING OPINION PER KEATING, J.

KEATING, J. (dissenting). Walter Sher was convicted of two counts of murder in the first degree and sentenced to death. If Sher had received a fair trial, the proof introduced by the People would amply justify his conviction. It is the pride, however, of American jurisprudence that the most cold-blooded killer is entitled to the same essentials of a fair trial as the most upright pillar of society. Sher's trial was infected by a number of unauthorized telephone communications to jurors in the middle of the trial. We believe, because of the nature of these communications, that a great likelihood existed that the jury could not have reached its verdict solely on the evidence introduced at trial. These communications, therefore, deprived Sher of being convicted by an impartial jury, one of the fundamental requirements of due process.

The majority, in finding these communications harmless, fail to perceive that our task is to evaluate the possible prejudice to the defendant by the rule announced in *Chapman* v. *California* (386 U.S. 18), since the defendant was denied one of the basic mandates for a fair trial. In *Chapman*, the Supreme Court stated that "the beneficiary of a constitutional error * * * [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id.*, p. 24.) Applying this test to the instant case, we must find that a substantial likelihood existed that the jurors considered the unauthorized communications in arriving at their verdict.

The District Attorney completed the People's case on Wednesday, October 23, 1963. Defense counsel made a number of motions at this time. All were denied. The court then dismissed the jurors and asked them to return on Friday morning when the defense would start presenting its case. Before the jury was permitted to return home,

the court admonished them that they were not to discuss the case among themselves or with anyone else. The Judge also directed them not to read or listen to any accounts of the trial in newspapers or on television. The jury was then permitted to go home. This admonishment had been given numerous times before as required by section 415 of the Code of Criminal Procedure.

When the jury returned on Friday, it was brought to the court's attention that a number of unauthorized communications had taken place and that the jurors discussed these communications among themselves. In order to determine the extent of the problem the Judge called each juror and alternate individually into his chambers, in the presence of counsel, and inquired if they received a communication, whether they had discussed it with other members of the jury, and asked the extent of their knowledge of other communications. The Judge conducted the investigation. He asked each juror to describe briefly what occurred. Though counsel were both present they did not fully participate in questioning the jurors. (See *People* v. *Colascione*, 22 N.Y. 2d 65)

It came to light that an unidentified female had telephoned a number of jurors on Thursday evening. She urged that the jury convict the defendant. She asked a few jurors to disregard the defense of insanity. She also remarked that Sher was a vicious killer, disregard the defendant's attorney, vote for the electric chair, Sher must be found guilty, ignore the plea of insanity and disregard the testimony of the defendant's psychiatrists. During one call she told juror Nachbar that Sher had a criminal record and that his co-felon Carbonaro had been found guilty and sentenced to death. The anonymous caller only reached five members of the jury. It was apparent, however, from questioning the jurors, that those jurors who had not received calls had, upon arrival at court, either held or overheard conversations detailing the substance of the calls. All the jurors, however, assured the Judge that they would

not be influenced by what had occurred and not draw any inference from it. The jurors each promised the Judge that they would only decide the case on the evidence introduced during the trial.

The defendant moved for a mistrial. The prosecution admitted that the comments made to juror Nachbar were prejudicial and suggested that Nachbar be withdrawn. Defense counsel did not concur in the District Attorney's appraisal of the situation and insisted on a mistrial. The Judge denied the motion, and the trial was continued with the same panel.

The District Attorney argues that, with the exception of the comments made to Nachbar, the others discussed by the jurors were not prejudicial. The other comments the District Attorney analogizes to statements that could have been read in newspapers, heard on the radio or uttered by the District Attorney at trial. He stresses that, even if this information were known by a juror before trial, this would not furnish ground to challenge the juror for cause, if, as was the case here, the juror stated he would not be influenced (Code Crim. Pro., § 376, subd. 2).

The District Attorney's argument is premised on the supposition that the prejudice to the defendant could have been purged by eliminating Nachbar and, since defense counsel refused to agree to his dismissal, the defendant waived his right to object to the composition of the jury.

The District Attorney's argument, we believe, is deficient in two respects. Though the statements that Sher was a vicious killer, that the psychiatrist should not be believed, give him the works, etc., might not be sufficient grounds for excusing a prospective juror if he had heard these comments before trial, it is clear, in this case, that these comments were the impetus for extensive discussions among the jurors before the case was given to them. The subtle psychological effect of this information on the decision-making process cannot accurately be measured. The

impact must have been substantial, however, because of the manner in which was was injected in the case and the subsequent en mass violation of the Judge's instruction not to discuss the case among themselves.

Secondly, a reading of the record is bound to leave one in grave doubt whether the removal of Nachbar would purge from possible jury consideration the prejudicial statement made to him. It is not clear that the dismissal of any one juror could correct the possibility of a biased jury deliberation. The People cannot show that, under the circumstances, the defendant would not be substantially prejudiced even though Nachbar had been dismissed. The Judge's examination of the jurors makes it obvious that all the jurors discussed the telephone calls. Though no other juror expressly testified that he know of Nachbar's call, and Nachbar was not asked whether he told anyone else, we believe a substantial likelihood existed that all, or at least some of the jurors, were also infected with the knowledge that Nachbar carried in with him on Friday morning.

In *People* v. *Cocco* (305 N. Y. 282) we reversed a conviction of second degree grand larceny because a prejudicial comment was made to *one* juror. Following the jury's verdict, the defendant moved to have the judgment of conviction set aside because of the unauthorized communication between a dismissed alternate juror and a woman juror made during a dinner break while the jury was deliberating. The alternate told the woman juror that he had heard that the defendant'' runs a sporting house on West Avenue''. The regular juror responded ''I don't believe it'' (*supra*, p. 286). After the verdict was rendered, defense counsel learned of the conversation and asked for the verdict to be set aside. The Judge conducted a hearing which developed that this was the only communication. It also appears that the jurors in *Cocco* did not discuss the information among themselves. We reversed and ordered a new trial. We stated: ''Although Mrs.

Ricker [the original juror] expressed to Huntsman [the alternate] her disbelief in the statement he had made to her and subsequently stated under oath that she had put out of her mind whatever he had said and that she had not mentioned to the jury or commented upon her conversation had with Huntsman, and although it appears from her affidavit that the statement made by him had no part whatever in the deliberations of the jury, we cannot say, in the circumstances disclosed by this record, that the furtive hearsay statement concededly made by Huntsman to a member of the jury, while that body was considering issues of fact submitted for its determination—including the defendant's character—did not prejudice defendant's substantial right." (305 N. Y. 282, 287, *supra.*)

In *Parker* v. *Gladden* (385 U. S. 363, 364) the Supreme Court reversed a State court conviction because a bailiff mentioned in the presence of three jurors: "Oh, that wicked fellow, he is guilty", and "If there is anything wrong the Supreme Court will correct it." The Supreme Court remarked: "[w]e believe that the unauthorized conduct of the bailiff 'invokes such a probability that prejudice will result that it is deemed inherently lacking in due process' " (*supra*, p. 365).

In *People* v. *De Lucia* (20 N Y 2d 275, 280) we granted reargument in light of *Parker*. *DeLucia* was a case in which some of the jurors had made an unauthorized trip to the scene of the crime. We remarked: "In this type of case, proof of the fact of the unauthorized visit is sufficient to warrant a new trial without proof of how such visit may have influenced individual jurors in their juryroom deliberations. Such a visit, in and of itself, constitutes inherent prejudice to the defendants."

We believe the case before us presents in infinitely more serious tampering with the jury than was present in the cases cited.

Notwithstanding the holdings in these cases, the prosecution raises the spectre of other mistrials in the future to

dissuade us from reversing in this case. We do not see this case, if a reversal and new trial were ordered, however, as putting a wedge in the door by which either unscrupulous police officers, District Attorneys or defense counsel can scuttle a crimminal prosecution by simply making a telephone call. In this case, five jurors were contacted in the middle of trial. The jurors disobeyed the Judge's instruction and failed to report the unauthorized communication to him. In addition, and more importantly, they extensively discussed the communications among themselves Another relevant factor is that the calls were made before the defense called its first witness, belying the possibility that the defendant motivated the calls. Sher's principal defense was insanity, and he made out a strong case.

The troublesome problem of posttrial attack on a jury's verdict is not involved in this case. No chance exists that a reversal in this case will "encourage convicted felons to 'intimidate, zeset and harass' * * * a discharged jury in an effort to establish possible grounds for a new trial" (*Parker* v. *Gladden, supra,* p. 369, dissenting opn. by HARLEM, J.).

The majority in support of the proposition that mere questioning and admonishing a jury is sufficient to purge from its consideration obnoxious extra-judicial communications cite no case upon which reliance can fairly be placed. None of the cases referred to dealt with instances of jury tampering.

In light of the prior precedents in this court and in the Supreme Court, the defendant's conviction should be reversed and a new trial ordered.

Judges SCILEPPI, BERGAN, BEIRTEL and JASEN concur in *Per Curiam* opinion; Judge KEATING dissents and votes to reverse in a separate opinion in which Chief Judge FULD and Judge BURKE concur.

Judgment of conviction, as amended, affirmed.